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July 22, 1994

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Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.--Room 222
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Comments of Sun Over Jupiter Broadcasting, Inc.
GC Docket No. 92-52
Reexamination of the Policy Statement on
Comparative Broadcast Hearings

Dear Mr. Caton:

Enclosed for filing on behalf of Sun Over Jupiter Broadcasting, Inc. ("Sun"), are an original plus four copies of Sun's Comments in response to the Commission's Second Further Notice of Proposed Rulemaking, FCC 94-167, released June 22, 1994.

Questions regarding these Comments may be directed to the undersigned counsel for Sun.

Sincerely,


Christopher A. Holt

CAH:jt
Enclosures

cc: Office of the FCC General Counsel -- (via hand delivery)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF SECRETARY

In the Matter of)
)
) GC Docket No. 92-52
Reexamination of the Policy)
Statement on Comparative) RM-7739
Broadcast Hearings) RM-7740
) RM-7741
)

To: The Commission

COMMENTS OF SUN OVER JUPITER BROADCASTING, INC.

Sun Over Jupiter Broadcasting, Inc. ("Sun"), by its counsel, hereby submits these Comments in response to the Commission's Second Further Notice of Proposed Rulemaking in Reexamination of the Policy Statement on Comparative Broadcast Hearings, GC Docket No. 92-52, FCC 94-167, released June 22, 1994 ("Second Further Notice"). In light of Bechtel v. FCC^{1/} the Commission has requested comment on the question of what objective and rational criteria can be used to evaluate the qualifications of mutually exclusive applicants for new broadcast facilities. Whatever criteria are adopted, it is clear that under Bechtel they must have a demonstrable relationship to promoting the selection of applicants that best serve the "public interest, convenience and necessity." The use

^{1/} 74 RR 2d 348 (D.C. Cir. 1993).

of diversification and broadcast related managerial experience as comparative criteria would satisfy Bechtel and offer the Commission an opportunity to select the best qualified applicants for new broadcast facilities. Accordingly, those criteria should be employed in the Commission's comparative analysis.

In support whereof, Sun respectfully states as follows:

1. The principal lesson of Bechtel is that the Commission's comparative criteria must be premised upon objective, empirical evidence which shows that they actually foster the selection of applicants that will serve the "public interest, convenience, and necessity" by promoting broadcast diversity and offering the best practicable service to the public. Conversely, criteria that have no demonstrable value as predictors of superior service must be rejected as arbitrary and capricious under Bechtel.

2. In the absence of integration, the Commission's longstanding diversification criterion should be the primary basis for assessing an applicant's comparative qualifications. That criterion meets the requirements of Bechtel because an applicant's media interests are objectively discernible and the presence or absence of those interests can be shown to bear a direct nexus to the promotion of competition and diversity. However, in light of changes in the regulatory environment that have occurred since the Policy Statement on Comparative

Broadcast Hearings^{2/} was adopted nearly 30 years ago, the diversification criterion should be modified to provide that a comparative demerit will be assessed only against applicants whose owners, in the aggregate, have a controlling interest in a medium of mass communications located in the same broadcast market^{3/} as the facility being sought.

3. Significant changes have occurred since 1965 that warrant this modification. The Commission's multiple ownership rules, cited in the 1965 Policy Statement in connection with the diversification factor,^{4/} have been profoundly relaxed.^{5/} Both in amending its rules in 1984, and in proposing further modifications in 1991,^{6/} the Commission cited the tremendous growth in the number of mass communications in the United States since its ownership rules were adopted in 1965.^{7/}

2/ 1 FCC 2d 393 (1965).

3/ As defined by the Arbitron rating service.

4/ 1 FCC 2d at 394, n. 5. See, Absolutely Great Radio, 95 FCC 2d 1023, 1026 (¶6) (1983) ("our multiple ownership rules and the diversification criteria are facets of the same policy").

5/ See Amendment of Multiple Ownership Rules, 100 FCC 2d 17 (1984), and Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992).

6/ Notice of Proposed Rulemaking, 6 FCC Rcd 3275 (1991).

7/ 100 FCC 2d at 18 (¶4) (1984). The Commission has also reexamined and discarded its Fairness Doctrine, citing the "explosive growth in both the number and types of outlets providing information to the public." Syracuse Peace Council, 2 FCC Rcd 5043, 5053 (¶66) (1987) (subsequent history omitted).

Additionally, in promulgating the 1984 amendment the Commission noted "the lack of relevance of a national ownership rule to the availability of diverse and independently owned radio and TV voices to individual consumers in their respective local markets."^{8/} More recently, when adopting the current ownership rules the Commission reiterated that "competition and diversity are relevant primarily at the local, not the national, level."^{9/}

4. Given these changes, the Commission's policy of assessing comparative demerits for media holdings situated outside the market no longer serves any rational purpose. Those interests do not affect local competition or diversity. Consequently, assessing a demerit against applicants that hold such interests produces no tangible benefit to the public within the market, as required by Bechtel. The Commission therefore should assess a diversification demerit only against applicants that already control a media outlet in the market to be served, thereby encouraging competition and the addition of new voices to the local mix. Conversely, media holdings that are not located in the market pose no threat to local competition or diversity and should not be factored into the Commission's comparative analysis.

^{8/} 100 FCC 2d at 19 (¶16). See also the specific finding to this effect at ¶24 on p. 25.

^{9/} 7 FCC Rcd at 2766 (¶20).

5. Secondly, in the absence of integration the Commission should look to an applicant's broadcast related managerial experience as another primary measure of whether or not it will provide the "best practicable service to the public." This criterion would be valid under Bechtel because, unlike a paper proposal that looks solely to the future, an applicant's prior track record can be verified and objectively assessed and is a reliable predictor of an applicant's future performance. Indeed, as the court noted in Bechtel, "although the Commission has argued that broadcast experience should be 'of minor significance' because it can come with time... it is hard to imagine that anyone seriously interested in 'picking winners' would so heavily downgrade the contestants' track records."^{10/}

6. This criterion should be employed, however, with two caveats. First, the Commission's current definition of "broadcast experience" should be expanded to include the provision of substantial credit for managerial experience and service in the broadcasting industry that is shown to have been significant in its depth, duration and continuity. Moreover, credit should be awarded only where the experience is tied directly to a credible and coherent operational plan. The Commission's current policy of awarding diminished credit for managerial experience that is broadcast "related" but not

^{10/} Bechtel, 74 RR 2d at 353. (Citation omitted.)

necessarily derived from working at a station^{11/} arbitrarily handicaps applicants who have acquired substantial expertise concerning the operation of broadcast stations in ways other than through direct "hands-on" management of such facilities.

7. For example, an applicant that can demonstrate a record of continuous, stable and successful managerial experience at a firm that sells air time on behalf of stations throughout the country could certainly possess the skills and knowledge necessary to provide superior service to the public. Similarly, an applicant's membership on the board of directors of a broadcast station group owner or a broadcast trade association could surely have helped that person gain expertise and experience necessary to provide exceptional public service. Yet under the Commission's current analysis, those individuals would likely lose to an applicant with a mere 4 years of "hands-on" managerial experience at a station that was forced to terminate service as the result of bankruptcy caused by that applicant's inept management of the station.

8. If the Commission truly desires to select applicants that are the most likely to provide superior service to the public, then it should not permit this sort of anomaly to occur by diminishing the significance of broadcast related managerial experience. Instead, it should employ a criterion that measures

^{11/} Phoenix Media Corp., 56 RR 2d 1241 (Rev. Bd. 1984) (subsequent history omitted); Angeles Broadcasting Network, 96 FCC 2d 5 (Rev. Bd. 1984).

an applicant's broadcast experience by the level, duration and stability of its managerial background, its proven success in the broadcast industry, and its service to the public in the field of broadcasting generally.

9. As noted above, however, broadcast related managerial experience should be considered only if it bears a direct and realistic correlation to the applicant's operation of station. Otherwise, the Commission would have no assurance that the attributes for which the applicant is being credited would in any way enhance its operation of the station. Thus, to receive such credit the applicant should be required to demonstrate that it has a comprehensive and genuine plan for incorporating that experience into the station's operations, either directly or through the supervision of professional management. In the absence of such a plan, credit for broadcast related managerial experience should be denied.

10. Whatever criteria are adopted, the Commission should ensure that mutually exclusive applicants receive a "full hearing" not only to satisfy the requirements of due process, but also to ensure that their claims are thoroughly tested in the crucible of litigation before one of them is awarded a valuable public franchise.

11. Moreover, fairness dictates that applicants who have not yet been designated for hearing should be permitted to amend their applications for a period of 30 days from the effective

date of the new rules so that they may establish their comparative credentials under the new criteria.

Respectfully submitted,

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